Supreme Court, U.S.
FILED

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No. _____.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SHAD LYNDS, Petitioner

v.

STATE OF OHIO, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI

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180 pp

QUESTION PRESENTED

1. Whether evidence obtained through a warrantless search of Petitioner's motor vehicle was improperly not suppressed pursuant to the doctrine of Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), where a vehicle was rendered immobile by an investigating officer locking Petitioner in a police cruiser, without arresting him and after a pat down search, and further where the keys were in the ignition when the officer had no reason to fear for her physical safety and had no reasonable, articulable suspicion that a crime had been committed or that Petitioner's vehicle contained evidence of a crime prior to conducting a search of the entire automobile which was done when the officer had removed the keys from the ignition.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceedings below were the Petitioner, Shad Lynds, Defendant below, and Respondent, the State of Ohio, Plaintiff below.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SHAD LYNDS, Petitioner

vs.

STATE OF OHIO, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI

Petitioner, Shad Lynds, requests that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Ohio entered in this action on April 27, 1994, which affirmed a decision of the Court of Appeals for the Fifth District of Ohio, which itself affirmed a final judgment of the Court of Common Pleas for Knox County, Ohio.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Ohio is reported at 69 Ohio St.3d 102 (1994). (Pet. App. A _____). The opinion of the Fifth District Court of Appeals for the State of Ohio is unreported but is appended hereto. (Pet. App. A _____). The decision of the trial court, the Court of Common Pleas for Knox County, Ohio, is unreported but appended hereto. (Pet. App. A_____).

JURISDICTION

The opinion of the Supreme Court of Ohio was entered on April 27, 1994. The jurisdiction of the court rests upon 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States of America provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, will not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons and things to be seized."

STATEMENT OF THE CASE

On December 30, 1990, there was a radio communication by the Police Department regarding suspicious persons on Oak Street, Mount Vernon, Ohio. The report indicated that there were two subjects with a leased car looking in cars in the area. Officer Butler of the Mount Vernon, Ohio, Police Department investigated the area and found an individual, Jason Blubaugh, by himself and not carrying anything. Officer Butler searched Mr. Blubaugh and finding nothing, released him.

Officer Lemley of the Mount Vernon, Ohio, Police Department was hiding nearby and witnessed the verbal exchange between Officer Butler and Mr. Blubaugh. Subsequent to the exchange, Officer Lemley saw Mr. Blubaugh speak to an individual whom she had seen around the corner. Officer Lemley saw Mr. Blubaugh continue on his way and saw the other individual

cross the street, a yard and get into his car which was legally parked on a nearby alleyway. When crossing the yard, the other subject, later identified as Shad Lynds, the Appellant herein, passed within 100 feet of Officer Lemley and did not appear to be carrying anything. After Appellant entered his vehicle, Officer Lemley saw him reach across the car. Officer Lemley believed that in so reaching, Appellant was putting something under the passenger seat. Officer Lemley quickly approached the vehicle and asked Appellant to step out of the car and to present his driver's license. Appellant produced his driver's license and did not appear to Officer Lemley to have anything on his person. Officer Lemley asked no other questions of Appellant and promptly locked him in the police car. Officer Lemley stated that she had not placed Appellant under arrest at that time, nor

charged him with any offense regarding the vehicle, nor read him his rights. Officer Lemley had searched Appellant prior to locking him in the police car. It was Officer Lemley's stated intent to hold Appellant until an investigation was completed. Appellant was not free to leave. Officer Lemley called the prosecuting attorney for advice regarding a search of the interior of the car and was told not to arrest Petitioner with an implication that a search of the interior of the car would not be justified at that time.

There was apparently no belief that Jason Blubaugh would return to the scene because a third officer was sent to a location where Jason was known to be. During this time, Officer Lemley and Officer Butler searched Appellant's vehicle. Officer Lemley does not recall whether or not she asked permission for

the search but didn't feel that she needed it anyway. In any event, no permission was granted and Defendant/Appellant/Owner of the vehicle, Shad Lynds, protested the search from beginning to end. The officers checked the vehicle including under the seat where they believed Appellant to have leaned. Under the seat were a radar detector (legal in the State of Ohio), a cassette tape and a flashlight. After the officers removed those items from the vehicle and were holding them, they discovered that they were wet. Officer Lemley testified that her reason for believing those items were stolen was a combination of the radio communication and that there had been problems in the entire city with people entering cars and stealing items. As a result of finding these items, and as a result of receiving citywide complaints, the officers took the keys from the ignition of Appellant's car and again

without permission continued their search of Appellant's car by opening the trunk. Appellant protested the search as vigorously as he could under the circumstances, yet it continued. In the trunk were various items including radar detectors and cassette tapes.

Appellant, as the result of the search, was charged with receipt of stolen property. The flashlight and cassette tape found under the seat were not listed on the Bill of Particulars as claimed stolen property. Every item of such property, as set forth on the bill of particulars came out of Appellant's car. None of the items listed in the bill of particulars were in plain view. Officer Lemley could see nothing in the trunk until she opened it. At no time throughout the entire search and seizure process did the officers have a warrant to search nor had they sought one. All of the items seized were seized prior

to Appellant actually being arrested (or subsequent to an unlawful arrest if it is determined that "securing" the appellant in the police cruiser to "complete the investigation" constituted an arrest). Officer Lemley testified at the suppression hearing that the officers opened the trunk because they believed the items found under the seat to be stolen by virtue of various reports over several months. The officers allegedly knew the items in the trunk were stolen due to several reports over several months involving radios and radar detectors being stolen. It was a continual problem "that we were having". At the suppression hearing Officer Lemley testified that the search of the trunk was an "inventory search" since the vehicle was going to be impounded. Again, at this time there was no search warrant nor was there any lawful arrest nor was there any threat to the physical safety of the officers. Moreover,

not one item found in the search of the passenger compartment or of the trunk of the vehicle was in plain view.

Officer Lemley testified that the officers did not know the name of the person who gave the report that the officers received over the radio but that she believed that report to be reliable. Apparently this belief was by virtue of the fact that there was a report. Nothing in Officer Lemley's report indicated that Appellant was ever seen looking into vehicles or walking the street. Officer Lemley, at the suppression hearing, admitted going to the scene, putting Appellant in the car, searching his car, and seeing the subject items for the first time after the search began. She further admitted that she lacked the permission for the search. None of the items were seen by Officer Lemley prior to Appellant being locked in a police cruiser. Officer

Lemley, who testified that she believed she had probable cause, further testified that it was not unusual to find a cassette, a flashlight or a radar detector as she did in this case. Throughout the entire process leading up to and including the search of Appellant's vehicle, Appellant was not being the subject of a protective search, but was locked in a police cruiser while the officers searched his vehicle finding items that were not in plain view; were not unusual; were not obviously contraband; and using those items as a basis to search for other items in other portions of the car which were also not in plain view. At no time did Officer Lemley indicate that she believed Appellant's vehicle to be stolen yet she did testify that the vehicle was to be impounded and that therefore an inventory search is what was conducted. In essence this was a warrantless search and seizure that did not

fall within any exception to the rules regarding search and seizure and therefore the items seized should have been suppressed by the trial court which denied the motion to suppress and found the search to be a legitimate search.

Justice Wright, in writing a dissenting opinion from the four-three decision of the Supreme Court of the State of Ohio, stated, in pertinent part as follows:

> "The majority's citation of Carroll v. United States (1925), 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, in it journal entry affirming this case is puzzling at best."
>
> "The undisputed, sworn testimony of the officer making the initial stop and the two later searches of the automobile establishes the following facts:
>
> 1. Officer Kimberly Lemley approached Lynds's parked automobile, ordered him out, and searched him based on nothing other than the officer's subjective suspicion. The officer then secured Lynds in her patrol car to, as she testified, "complete the investigation."
>
> 2. Still based on subjective suspicion, Officer Lemley completed an initial search of the car's interior which yielded nothing that

would justify an arrest of Lynds. In fact, during oral argument the state conceded that the police officer conducting the search called the prosecutor for advice and was told not to arrest Lynds after the initial stop, implying that a search of the interior of the car would not be justified at that time.

3. Undaunted by this advice, the police officer continued, without either a warrant or consent from Lynds, to conduct what the officer characterized under oath as an "inventory search." In the course of this further search the officer took Lynds's keys and opened the trunk of his automobile and discovered items that later proved to be stolen goods. When asked under oath why she opened the trunk, Officer Lemley replied: "We found items that we believed to be stolen and we were going to have the vehicle impounded. We did an inventory search, also." Yet just minutes later, on cross-examination, Officer Lemley testified that the reason she confined Lynds in her police cruiser prior to searching the care was "to complete the investigation."

4. Officer Lemley testified that lynds protested against the search from beginning to end, insisting that his girlfriend be allowed to take the car.

As stated above, the rule of Carroll is totally out of sync with the facts of the case before us. Based on the response Officer Lemley received from her request for legal advice, the officers clearly no longer had

"reasonable cause * * * for belief that the contents of the automobile offend against the law." Carroll at 158-159, 45 S.Ct at 287, 69 L.Ed. at 554. Hence, without probable cause, Carroll v. United States is inapposite to the facts of this case.

I think it interesting that the search in Carroll took place at a time when Warren Harding was President of the United States, Earl Warren had not yet become district attorney, and the genesis of Fourth Amendment jurisprudence with respect to the States was forty years in the future."

REASONS FOR GRANTING THE WRIT

Certiorari should be granted regarding this important federal question to resolve the conflict and confusion among the various states and circuits with respect to the automobile exception to the warrant requirement.[1] Moreover, even though there is confusion among the states and circuits, the Supreme Court of Ohio in its decision herein has apparently improperly developed a view that there is no limit to the automobile exception to the warrant requirement.[2] Lastly, the issues involved herein raise important federal questions which go to the very heart of the Bill of Rights.[3] In fact, had Officer Lemley been male, dressed in a red coat and powdered

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[1] See Carroll v. United States, 267 US. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

[2] Id.

[3] Amendments 1 through 10 to the United States Constitution.

wig, 220 years previously, her actions (albeit in regard to a horse drawn rather than horseless carriage) would have come as no surprise but would have been no less an outrage. It is this tribunal, and only this tribunal, that has the power and capacity to correct the Supreme Court of Ohio and clarify the law as it relates to these issues for the benefit of the bench, the bar, the law enforcement community, and most importantly, the citizenry.

I. The state courts and the federal circuit are divided and confused with respect to the state of the law regarding the automobile exception to the warrant requirement. Justice Wright's dissent from the Supreme Court opinion below is not the only clear statement of displeasure from a Supreme Court bench. In fact, Justice Durham of the Supreme Court of Utah in his majority opinion contained in State v.

Larocco[4] stated "the United States Supreme Court's interpretation of the Fourth Amendment, especially in the context of automobile searches, has been the source of much confusion among judges, lawyers, and police. Justice Paul has commented, '[T]he law of search and seizure with respect to automobiles is intolerably confusing. The court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided.'[5]".

To fully appreciate the nature of the problem, one must briefly review the general notion of the automobile exception. The automobile exception to the warrant requirement contained in the Fourth Amendment to the United States Constitution was first clearly articulated in Carroll

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[4] State v. Larocco 794 P.2d 460 (1990).

[5] Robbins v. California, 453 U.S. 420 (1981).

v. United States[6]. Carroll[7] was a prohibition era case involving the transportation of liquor hidden in an automobile. The court therein discussed the ability for an automobile to be moved and, therefore, the impracticality of obtaining a warrant. In short, the Carroll[8] court concluded that where it is not practicable to secure a warrant because the vehicle may be quickly moved out of the jurisdiction (exigent circumstances) and when the officer has probable cause to believe that the vehicle is involved in criminal activity, no search warrant is required. In Katz v. United States,[9] this court held that searches conducted outside the judicial process, without prior

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[6] Supra.

[7] Infra.

[8] Infra.

[9] Katz v. United States 389 U.S. 347 (1967).

approval by judge or magistrate are per se unreasonable under the Fourth Amendment and that this requirement is subject only to a few specifically established and well delineated exceptions. The Katz[10] court also held that an individual's expectation of privacy was a suitable criterion for determining whether the Fourth Amendment was applicable.

During the early 1970's this court vacillated in its Fourth Amendment jurisprudence with respect to the automobile exception. In Chambers v. Marone,[11] the court upheld a warrantless search of an automobile which occurred after the occupants had been arrested and the car had been driven to the police station, virtually ignoring the mobility factor outlined in Carroll as a justification for the automobile exception.

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[10] Infra.

[11] Chambers v. Marone 399 U.S. 42 (1970)

In 1971, this court reiterated its position that warrantless searches are per se unreasonable and subject only to a few specifically established exceptions and invalidated a warrantless search of an arrestee's automobile in Coolidge v. New Hampshire.[12] The Coolidge[13] court distinguished the case from Chambers[14] by stating that the automobile was parked in a driveway while the Chambers[15] vehicle had been moving on a public highway.

By 1974, however, the Coolidge[16] analysis suffered under Cardwell v. Lewis.[17] The general theory of the Cardwell[18] plurality

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[12] Coolidge v. New Hampshire 403 U.S. 443 (1971).

[13] Infra.

[14] Infra.

[15] Infra.

[16] Infra.

[17] Cardwell v. Lewis 417 U.S. 583 (1974).

[18] Infra.

was that one has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as a repository of personal effects.

The Cardwell[19] viewpoint held favor at least until 1985 (see California v. Carney[20] where the court expanded the circumstances where warrantless searches of motor vehicles would be allowed in that it virtually eliminated the requirement of exigent circumstances.) The Carney[21] court indicated that the capacity to be quickly moved was clearly the basis of the holding in Carroll[22] but was no longer the only basis for the automobile exception. Specifically, the court was referring to

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[19] Infra.

[20] California v. Carney 471 U.S. 386 (1985).

[21] Infra.

[22] Infra.

the diminished expectation of privacy notion in that vehicles can be looked into and are subject to pervasive regulation.

The diversity of views with respect to the automobile exception do not end with this court's own decisions, the decisions of the Ohio Supreme Court, or those of the Supreme Court of Utah. Rather, they span the nation. The United States Court of Appeals, Ninth Circuit, has held that the automobile exception applies only when a vehicle is on the open road or is capable of movement and is in a place not regularly used for residential purposes--temporary or otherwise. U.S. v. Gooch[23]. In accord with Gooch[24] is State v. Kock[25] where the Supreme Court of Oregon in 1986 expressed disdain for the "seminal case of Carroll

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[23] U.S. v. Gooch 6 F.3d. 673 (9th Cir. 1993).

[24] Infra.

[25] State v. Kock 725 P.2d 1285, 302 Or. 29 (Or. 1986).

v. United States . . . and its progeny, including United States v. Ross, 456 U.S. 798 (1982), when it held that any search of an automobile that was parked, immobile and unoccupied at the time the police first encountered it in connection with the investigation of a crime must be authorized by a warrant issued by a magistrate or, alternatively, the prosecution must demonstrate that exigent circumstances other than the potential mobility of the automobile exist." Further in State v. Zemunski[26] the Supreme Court of Nebraska dealing with facts similar to those in the instant case, held that since the Defendants therein were in handcuffs by the time the officers turned their attention to the vehicle, there was no longer a need for a protective search. However, Nebraska is apparently in complete disagreement with

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[26] State v. Zemunski 423 N.W.2d 443, 228 Neb. 536 (Neb. 1988).

Alabama. In Mewbourn v. State,[27] the Court of Criminal Appeals of Alabama held that a lack of exigent circumstances, the officer's ability to obtain a search warrant, and the immobilization of a car when surrounded by 15 law enforcement officers would not bar a warrantless search of the vehicle.

While some court's struggle with defining just what the requirements of the automobile exception are, others struggle with another of Carroll's[28] requirements, specifically probable cause. Again, in a case similar to the instant case, the Supreme Court of Utah in State v. Schlosser,[29] found that even if articulable and reasonable suspicion would have been

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[27] Mewbourn v. State 570 So.2d 805 (Ala.Cr.App. 1990).

[28] Infra.

[29] State v. Schlosser 774 P.2d 1132 (1989).

sufficient to justify an officer's action in opening the passenger door of an automobile which he has stopped for traffic violation, the officer did not have a reasonable and articulable suspicion of criminal activity based on the fact that he had seen the passenger acting fidgety, turning to the left and to the right, and turning back to look at the officer in such a manner as to make the officer believe he was attempting to hide something. In a case where an officer's suspicions far outweigh those of Officer Lemley in the instant case, the Supreme Judicial Court of Massachusetts held that police officers did not have probable cause to believe that a Defendant was or had been engaged in criminal activity so as to warrant stopping the Defendant's vehicle and searching the vehicle for a handgun where police had been notified by the clerk at a convenient store that the Defendant had a handgun in his

pocket but that there was no indication that the gun was used in any manner to threaten to intimidate the store clerk, or that the Defendant lingered for an unusual period of time at the store or that he was casing the store in preparation for a robbery and where further the police had no reason to believe, before conducting a search of the vehicle, that the Defendant had no license to carry a firearm. Common Wealth v. Couture[30]. Even making a stuffing motion under the seat of a car upon being pulled over was insufficient, by itself, to justify a warrantless search of the car in Arnold, III v. State[31].

While cases such as the foregoing attempt to carefully balance the probable cause and reasonable articulable suspicion concepts, other states take a more certain

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[30] Commonwealth v. Couture 522 N.E.2d 538, 407 Mass. 178 (1990).

[31] Arnold, III v. State 544 So.2d 294 (Dist. Ct. App. Fla. 2d Dist. May 26, 1989).

view. The Supreme Court of Missouri in State v. Milliorn[32] has, in its review of the state of the law, identified that law enforcement personnel may conduct a warrantless search of a vehicle and seize contraband found if (1) there is probable cause to believe that the vehicle contains contraband and (2) exigent circumstances necessitate the search. However, the Milliorn[33] court went even farther and held that as a practical matter, "exigent circumstances exist whenever an automobile is involved; the mere possibility that the vehicle can be moved is generally sufficient justification for a warrantless search." (emphasis added). Therefore, Missouri is taking the position that the only requirement for a warrantless search of an automobile is probable cause which

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[32] State v. Milliorn 794 S.W.2d 181 (Mo.banc. 1990).

[33] Infra.

it defines as requiring no more than a reasonable belief that it is more probable than not that the vehicle contains illegal property. Petitioner would submit that there is a considerable difference between a "reasonably articulable suspicion" and "more probable than not".

The reasonable expectation of privacy issue is not dead either. However, the states appear to be backing away from the standard as developed by this court. In fact, in People v. Anderson[34], the court noted that the Defendant therein had manifested a subjective expectation of privacy in a tag containing the gross vehicle weight rating located on the door edge of his Blazer by closing the door of his vehicle upon exiting. The court went on to state that such an expectation of privacy is objectively reasonable by

[34] People v. Anderson 531 N.E.2d 116, 176 Ill.App.3d 348, 125 Ill.Dec. 937 (Appellate Court of Illinois 2d District 1988).

society's standards and further stated that although people do not have the same expectation of privacy in their automobiles as they do in their homes, they do not surrender all of their Fourth Amendment protection when they enter their automobile. The Anderson[35] court in dicta stated that the door of the automobile is an integral aspect of retaining the privacy, albeit diminished, of the passenger compartment. The fact that the Defendant had voluntarily exited his vehicle upon being stopped by a law enforcement officer, coupled with his immediately closing the driver's door, manifested his expectation of privacy. In short, the Anderson court was taking the position that while there may be a diminished expectation of privacy in an automobile, the owner of the automobile may

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[35] Infra.

enhance that expectation of privacy through his or her actions.

The Anderson[36] view would be accepted in the State of Florida, at least in the Fifth District Court of Appeals therein which, in Jenkins v. State[37] held that a police officer illegally seized items in plain view inside the passenger compartment of a vehicle when, after encountering the motorist parked on a right-of-way and ordering the motorist to exit the vehicle and walk to the police car, the officer then approached the motorist's now vacant vehicle and looked inside. The court even assumed, arguendo, that the officer, for his own safety, could order the motorist who had not committed any violation of the law to exit the vehicle in order to check on the motorist's well being but having done so, the officer then had no

[36] Infra.

[37] Jenkins v. State 567 So.2d. 528 (1990).

justification to inspect the motorist's vacant vehicle and no probable cause to make an arrest until the items were observed inside the vehicle.

It is evident that not only are the courts divided on what the automobile exception to the warrant requirement provides, they are equally divided on the application of those requirements. Such division and confusion has resulted in unequal and unclear application of law.

II. In the instant case, the Ohio Supreme Court has apparently improperly developed a view that there is no limit or guide to the automobile exception (an apparent expansion of Carroll)[38]. The arresting officer herself testified that she approached Petitioner's parked automobile, ordered him out, and searched him based on nothing other than her subjective suspicion and that she then,

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[38] Infra.

without arresting Petitioner, secured him in her patrol car to complete the investigation. She then proceeded to search the passenger compartment of the automobile where she found a few electronic items which she did not believe to be unusual to be present. However, she proceeded to remove the keys from the ignition and open and search the trunk, over the Defendant's continuous protests (the Ohio Supreme Court having noted that Defendant protested the search "from beginning to end".). Depending upon which application of the automobile exception one chooses to apply to the instant case, the results may vary. The Ohio Supreme Court relied on Carroll[39] and United States v. Ross[40]. However, as has been shown, the

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[39] Infra.

[40] [40] United States v. Ross 456 U.S. 798 (1982).

Carroll[41] doctrine requires both exigent circumstances and probable cause. It appears that Ohio may be developing the view along with Missouri that by virtue of there being an automobile involved in the first place, that qualifies as exigent circumstances. Unfortunately, it also appears that Ohio is eliminating the probable cause requirement, or at least limiting it to something considerably less than a reasonable, articulable suspicion. Perhaps this is being done similar to Missouri, also. In fact, it appears that the Ohio Supreme Court is attempting to do away with the exclusionary rule as it applies to searches and seizures of automobiles.

Additionally, it is clear that Petitioner's vehicle was no longer mobile. He was secured in the police cruiser and Officer Lemley had possession and control

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[41] Infra.

of the keys. The split referred to in the preceding section among the courts of this country clearly demonstrate that depending upon what state a suspect resides in controls whether or not his vehicle is deemed to be moveable for Fourth Amendment purposes. It is, therefore, necessary that this court clarify these issues.

CONCLUSION

In an area of federal law so important as the Fourth Amendment as it relates to automobiles, it can no longer be countenanced that the state of the law throughout the union is totally inconsistent and unclear. While it is one matter to have certain individuals rights vary from state to state depending upon the laws of the State, it is quite another to have individuals' federal rights vary from state to state. Therefore, given the past conflict within this court itself and the tremendous conflict within the various states, and given the detrimental effect that this has had on the Petitioner, this court should grant certiorari and clean with the cloth of clarity the slate of confusion which has existed since 1925.

Respectfully submitted,

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IN THE COURT OF COMMON PLEAS, KNOX COUNTY, OHIO

STATE OF OHIO

Plaintiff

-vs- Case No. 91CR030035

SHAD W. LYNDS

Defendant

JOURNAL ENTRY

This cause came before the Court this 23rd day of August, 1991, for purposes of a suppression hearing.

The Court finds that the Defendant is present in the Courtroom with Counsel, Alan P. Gustafson. The State of Ohio is represented in the person of Robert J. McClaren, Assistant Prosecuting Attorney for Knox County.

The Court finds that the Defendant is charged with Receiving Stolen Property, in violation of Section 2913.51(A) of the Revised Code of Ohio, a felony of the

fourth degree as contained within the Indictment.

After hearing all the evidence relevant to this matter the Court denies the motion to suppress. The Court further finds that there was sufficient probable cause in this matter for the officers to carry out a warrantless automobile search under the Carroll doctrine.

Bond previously entered is continued.

_____

Otho Eyster, Judge

APPROVED

JOHN W. BAKER
Prosecuting Attorney

BY: /s/
Robert J. McClaren
Assistant Prosecuting Attorney

/s/
Alan P. Gustafson
Attorney for the Defendant

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	
Plaintiff-Appellee	Case No. 92-CA-01
-vs-	
SHAD LYNDS	O P I N I O N
Defendant-Appellant	

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. Norman J. Putman, J.
Hon. John R. Milligan, J.

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas Case No. 91CR030035
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	

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PUTNAM, J.

This is an appeal from a judgment of conviction and sentence entered upon a plea of no contest to the charge of receiving stolen property, a violation of R.C. 2913.51(A). Defendant-appellant, Shad Lynds (appellant), assigns the following as error:

ASSIGNMENT OF ERROR I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE UNLAWFULLY FOUND IN APPELLANT'S VEHICLE PURSUANT TO AN IMPROPER AND UNLAWFUL SEARCH.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE UNLAWFULLY FOUND IN APPELLANT'S VEHICLE PURSUANT TO AN IMPROPER AND UNLAWFUL SEIZURE.

For the reasons stated below, appellant's assignments of error are overruled.

On the evening of December 30, 1990, Mount Vernon Police Officers Julie Butler and Kimberly Lemley were on routine patrol when they received a radio report that there were two suspicious subjects seen in the area of Oak Street in Mount Vernon.

Officer Butler investigated the area and found the individual walking by himself. Officer Butler talked with this person for a brief moment and then continued on her way down Oak Street.

Officer Lemley proceeded to Oak Street on foot and observed the exchange between Officer Butler and the individual. Officer Lemley also observed appellant

standing around the corner of a house as if looking at the encounter between Officer Butler and the other individual. After Officer Butler released this individual, Officer Lemley saw appellant run across Oak Street, across a yard, and into a vehicle parked near the East Elementary School. T.9-10. When appellant got into the vehicle, Officer Lemley observed him reach across and put something under the front passenger seat of the car. T.10. Officer Lemley then approached the vehicle and asked appellant to get out and produce a driver's license, which he did.

Officer butler arrived, and with the appellant secured in the cruiser, the officers searched the vehicle where appellant had placed something underneath the front seat. T.11. The officers found a radar detector, cassette tape, and a flashlight. Id. All items were

wet and Officer Lemley, believing that the items were stolen, conducted a search of the car's trunk. T.13. In the trunk, the officers found more radar detectors. Officer Lemley testified that over the past months she had taken several reports regarding stolen radar detectors. T.13.

I & II

Appellant moved to suppress the evidence, arguing that the warrantless search of his vehicle and seizure of the items was unlawful. The trial court overruled this motion and appellant now assigns this as error.

We overrule both of appellant's assigned errors on the authority of Carroll v. United States (1925), 267 U.S. 132. In that case, the court set forth the automobile exception to the general rule that a warrant must be secured before a search is conducted. The Court held that the ready mobility of an

automobile justifies a lesser degree of constitutional protection of privacy interests. The Court stated:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. (Emphasis in original).

Carroll, supra, at 153.

Officer Lemley testified that when she approached appellant the keys were in the ignition and she "wanted to get to the car before he moved it." T. 12-13. Additionally, appellant's running to the car shows consciousness of guilt and Officer Lemley had reasonable suspicion to stop appellant. Terry v. Ohio (1968),

392 U.S. 1; State v. Bobo (1988), 37 Ohio St. 3d 177.

For the foregoing reasons, appellant's assigned errors are overruled and the judgment of the Knox County Court of Common Pleas is affirmed, and this cause is remained to that court for execution of sentence.

Gwin, P.J. and

Milligan, J. concur.

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JUDGES

NJP/emc 1216 1217

IN THE COURT OF APPEALS FOR KNOX COUNTY. OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- SHAD LYNDS Defendant-Appellant	JUDGMENT ENTRY CASE NO. 92-CA-01

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Knox County, Ohio, is affirmed and this cause is remanded to that court for execution of sentence.

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JUDGES

THE STATE OF OHIO, APPELLEE,

v.

LYNDS, APPELLANT.

[Cite as *State v. Lynds* (1994), 69 Ohio St.3d. 102.]

Constitutional law--Search and seizure--Warrantless search of entire automobile permitted, when.

STATE v. LYNDS
Dissenting Opinion, per Wright J.

(No. 93-402--Submitted February 23, 1994--Decided April 27, 1994.)

APPEAL from the Court of Appeals for Knox County, No. 92-CA-01.

John W. Baker, Knox County Prosecuting Attorney, and *Robert J. McClaren*, Assistant Prosecuting Attorney, for appellee.

Christian D. Roland and *Alan P. Gustafson*, for appellant.

The judgment of the court of appeals is affirmed on authority of *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, and *United States v. Ross* (1982), 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572.

MOYER, C.J., DOUGLAS, RESNICK and F.E. SWEENEY, J.J., concur.

A.W. SWEENEY and WRIGHT, J.J., dissent with opinion.

PFEIFER, J., dissents.

WRIGHT, J., dissenting. The majority's citation of *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed 543, in its journal entry affirming this case is puzzling at best. In *Carroll*, the United States Supreme Court held that a warrantless search of an automobile may be conducted under circumstances that would not justify the search of a home or place of business, provided there is probable cause to believe that the automobile contains items that the authorities are entitled to seize. The *Carroll* decision explores the development of the Fourth Amendment from the time its adoption and is an interesting and worthwhile discussion of the differences involved in the criteria necessary for the search of a citizen's home or place business and the criteria necessary for the search of the interior

of an automobile. Nowhere in *Carroll*, however, can one find support for the proposition that a search without a warrant is anything other that *per se* unreasonable, absent some recognized exception to this bulwark of Fourth Amendment jurisprudence. In my view, the salient facts in this case do not give rise to probable cause under *Carroll* and do not fall within any of the well-recognized exceptions to the warrants clause, particularly the inventory exception espoused by the officers present at the time of the search.

The undisputed, sworn testimony of the officer making the initial stop and the two later searches of the automobile establishes the following facts:

1. Officer Kimberly Lemley approached Lynds's parked automobile, ordered him out, and searched him based on nothing other than the officer's subjective

suspicion. The officer then secured Lynds in her patrol car to, as she testified, "complete the investigation."

2. Still based on subjective suspicion, Officer Lemley completed an initial search of the car's interior which yielded nothing that would justify an arrest of Lynds. In fact, during oral argument the state conceded that the police officer conducting the search called the prosecutor for advice and was told not to arrest Lynds after the initial stop, implying that a search of the interior of the car would not be justified at that time.

3. Undaunted by this advice, the police officer continued, without either a warrant or consent from Lynds, to conduct what the officer characterized under oath as an "inventory search." In the course of this further search the officer took Lynds's keys and opened the

trunk of his automobile and discovered items that later proved to be stolen goods. When asked under oath why she opened the trunk, Officer Lemley replied: "We found items that we believed to be stolen and we were going to have the vehicle impounded. We did an inventory search, also." Yet just minutes later, on cross-examination, Officer Lemley testified that the reason she confined Lynds in her police cruiser prior to searching the care was "to complete the investigation."

4. Officer Lemley testified that lynds protested against the search from beginning to end, insisting that his girlfriend be allowed to take the car.

As stated above, the rule of Carroll is totally out of sync with the facts of the case before us. Based on the response Officer Lemley received from her request for legal advice, the officers

clearly no longer had "reasonable cause * * * for belief that the contents of the automobile offend against the law." Carroll at 158-159, 45 S.Ct at 287, 69 L.Ed. at 554. Hence, without probable cause, Carroll v. United States is inapposite to the facts of this case.

I think it interesting that the search in Carroll took place at a time when Warren Harding was President of the United States, Earl Warren had not yet become district attorney, and the genesis of Fourth Amendment jurisprudence with respect to the States was forty years in the future." See *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct 1684, 6 L.Ed.2d 1081. It was not until fifty years after *Carroll* that the court developed the inventory search exception, designed to protect police officers from suits charging pilfering. See South Dakota v. Opperman (1976), 428 U.S. 364,

96 S.Ct. 3092, 49 L.Ed.2d 1000. In *South Dakota v. Opperman, supra*, the United States Supreme Court upheld the validity of an inventory search of an automobile after the automobile was towed to the city's impound lot for being illegally parked overnight in a restricted zone. The search was carried out using a standard inventory form and pursuant to standard police procedures. Probable cause was found to be unnecessary. The court emphasized, however, that it deemed the inventory search reasonable because the "police were indisputably engaged in a caretaking search of a lawfully impounded automobile * * * only after the car had been impounded for multiple parking violations." Id. at 375, 96 S.Ct., at 3100, 49 L.Ed.2d at 1009. In addition, the court noted that the "inventory itself was prompted by the presence in plain view of a number of

valuables inside the car" and that the owner "was not present to make other arrangements for the safekeeping of his belongings." Id. at 375-376, 96 S.Ct. at 3100, 49 L.Ed2d at 1009. Based on this set of criteria, *nothing* in the facts of the case before us could permit one to reasonably conclude that what Officer Lemley conducted was a lawful inventory search.

In truth, the only real justification for the search of Lynds's locked trunk is that an enterprising officer discovered stolen goods there as a result of that search. The danger of adopting such a criterion is evident. Justifying the search on the basis of what is found "just 'will not do.'" *Smith v. Ohio* (1990), 494 U.S. 541, 543, 110 S.Ct. 1288, 1290, 108 L.Ed2d 464, 467, summarily reversing *State v. Smith*

(1989), 45 Ohio St.3d 255, 544 N.E.2d 239.

For the reasons aforesaid, I respectfully dissent.

A.W. SWEENEY, J., concurs in the foregoing dissenting opinion.

IN THE COMMON PLEAS COURT FOR KNOX COUNTY, OHIO

STATE OF OHIO :

Plaintiff :

vs. : Case No.

91CR030035

SHAD W. LYNDS :

Defendant :

APPEARANCES:

Knox County Prosecutor's office, by

Mr. Robert McClaren

For the Plaintiff

Mr. Alan P. Gustafson

For the Defendant

HON. OTHO EYSTER

Presiding

August 23, 1991

LINDA S. MCGEE

Court Reporter

FLORINE I. VARNER &

ASSOCIATES, INC.

1-800-835-5251

1-8000-522-7896

THE COURT: This is Case No. 91CR030035, State of Ohio v. Shad Lynds. Let the Record show that the Defendant is present in the courtroom represented by Al Gustafson and the State in the courtroom of Bob McClaren, Assistant Knox County prosecutor. We are her to proceed to Motion to Suppress. Are you ready to proceed?

MR. MCCLAREN: Yes.

THE COURT: The defense?

MR. GUSTAFSON: Yes, Your Honor.

THE COURT: Just two witnesses?

MR. MCCLAREN: That's all, Your Honor.

THE COURT: Raise your right hand.

JULIE D. BUTLER of lawful age, a Witness herein, called by the Plaintiff as upon Direct Examination pursuant to the Rules of Criminal Procedure, being first duly sworn according to law, was examined and testified as follows:

THE COURT: Any preliminary matters here?

MR. MCCLAREN: Nothing for the prosecutor.

MR. GUSTAFSON: I move for separation of witnesses.

THE COURT: Who is the first witness?

MR. MCCLAREN: Patrolman Julie Butler.

THE COURT: Who was the arresting officer?

MR. MCCLAREN: Officer Lemley.

THE COURT: The separation is granted and I will ask you not to remain in the courtroom. Call your first witness.

MR. MCCLAREN: The State would call Officer Julie Butler.

DIRECT EXAMINATION OF JULIE D. BUTLER

BY MR. MCCLAREN:

Q. Please state your name and address.

A. I'm sorry, I couldn't hear.

Q. State your name and address.

A. Julie D. Butler, 5 North Gay Street, Mount Vernon.

Q. What is your occupation?

A. Police officer.

Q. What law enforcement agency?

A. Mount Vernon Police Department.

A. How long have you been employed there?

A. Two years.

Q. Where was it previously?

A. 12 years with the Knox County SHeriff's office.

Q. What are your present duties?

A. Police officer.

Q. And what is your duty schedule?

A. My duty schedule now, sir?

Q. Yes.

A. 8:00 a.m. to 4:00 p.m.

Q. What was your duty schedule on the 30th of December, 1990?

A. Midnight to 8:00 a.m.

Q. Okay. Is one of your duties to assist in the investigation of crimes?

A. Yes, sir.

Q. And you were so employed on the 30th of December, 1990?

A. Yes.

Q. Were you in uniform and squad car?

A. Yes, sir.

Q. Did you have an investigation, an occurrence on Oak Street that day?

A. Yes, sir.

Q. And what happened when you came to investigate on Oak Street on the 30th of December, 1990?

A. I was dispatched on a report of a suspicious person on Oak in the area of the East Elementary School. Patrolman Lemley advised that she would go to the school where the suspect went in the car and watched from the car window in the area in the cruiser.

Q. What happened next?

A. I was patrolling up Oak and I came across the subject coming up behind the car and talked to the subject and

identified him and asked what he was doing in the area.

Q. What did he say?

A. He told me that he had a fight with his parents and was out for a walk and used to live in the area and came back to walk around that particular area.

Q. What happened next?

A. After talking to the subject I released him and continued out of Oak Street and out of sight of this person.

Q. Why did you release this gentleman?

A. I just took his word that he was just out for a walk. I had no reason to hold him.

MR MCCLAREN: Thank you, no further questions of this witness.

THE COURT: Cross examination.

CROSS EXAMINATION OF JULIE D. BUTLER

BY MR. GUSTAFSON:

Q. Who was the subject?

A. Jason Blubaugh.

Q. And you said that you had a report that came in of a suspicious person; is that right?

A. Yes, sir.

Q. Was this radioed communication?

A. Yes, sir.

Q. And basically what you had was radio communication saying that there was a suspicious person on Oak Street, Mount Vernon, Ohio?

A. Yes, sir.

Q. And can you identify who had reported that suspicious person?

A. I was not given a name across the radio, no, sir.

Q. You were given a radio communication in your patrol car that there was a suspicious person on Oak Street, Mount Vernon?

A. Suspicious persons, yes, sir.

Q. And when you say Jason he was by himself?

A. Yes, sir.

Q. Did he have anything with him?

A. Not at the time.

Q. Carrying anything?

A. No, sir.

Q. Did you search him?

A. Yes, sir.

Q. And you did?

A. Yes, sir.

Q. And obviously you didn't find anything?

A. No, sir.

Q. And you released him?

A. yes, sir.

Q. Did you see him again that evening?

A. Yes, sir.

MR. GUSTAFSON: I have no further questions.

THE COURT: Redirect?

MR. MCCLAREN: Nothing, your Honor.

THE COURT: You can step down. Thank you, officer.

MR. MCCLAREN: State calls Officer Lemley.

THE COURT: Separation of witnesses, you will have to leave the courtroom, officer.

MR. MCCLAREN: State reserves the right to call Officer Butler if necessary.

THE COURT: Just tell her to leave.

MR. MCCLAREN: Stay out there until I tell you when to go.

THE COURT: They have been sworn.

KIMBERLY S. LEMLEY, of lawful age, a Witness herein, called by the Plaintiff as upon Direct Examination pursuant to the Rules of Criminal Procedure, being first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION OF KIMBERLY S. LEMLEY

BY MR. MCCLAREN:

Q. State your name and address.

A. Kimberly S. Lemley, 5 North Gay Street.

Q. What is your occupation?

A. Police officer of the City of Mount Vernon.

Q. How long have you been employed there?

A. 11 years.

Q. What is your previous law enforcement experience?

A. I had a year and eight months as dispatcher and 11 years as an officer.

Q. What are your duties?

A. Patrol.

Q. And what is your shift?

A. Midnight to 8:00 a.m.

Q. Were you so employed ont he 30th of December, 1990?

A. Yes, I was.

Q. Were you in uniform?

A. Yes, I was.

Q. And did you have an occasion to investigate an occurrence on Oak Street?

A. Yes, I did.

Q. To your knowledge when were you there?

A. About 37 minutes after 12 we received a complaint about two subjects that had a leased car and they were seen looking in cars in that area.

Q. And when you got there what did you do?

A. I parked out of the area a little ways and walked down to the East School area behind Oak Street and located the car.

Q. What did you do next?

A. Patrolman Butler came into the area and I stood in the area of two garages and watched the car and she came into the area and located on subject around one of the cars.

Q. What did you do next?

A. After she talked to the subject and released him, at the time as she was talking to him I observed another subject

standing around the corner of the house as if looking at what was going on and I advised--after she released who she advised was Jason Blubaugh, after she released Jason and left the area Jason went down where the other subject was standing ont he corner of Oak Street and Jason disappeared and the other subject ran across Oak Street and ran across the other yard and into the vehicle. I was watching.

Q. And did the subject do anything next?

A. As he got to the car, he got into the car and as he was getting in he appeared to be reaching over, appeared reaching across and putting something under the passenger seat of the front of the car.

Q. What did you do next?

A. I approached the vehicle before he could move it and asked him to get out of the vehicle and asked for the driver's license which he produced.

Q. Did you ask him any other questions?

A. Not at that time. I put him in the cruiser.

Q. Did he identify himself?

A. Yes, he gave me his driver's license.

Q. Whose?

A. Shad Lynds.

Q. Is that the same gentleman in the courtroom today?

A. Yes, he is.

Q. Would you identify him?

A. Sitting at the Defendant's table and sitting by his attorney.

MR. MCCLAREN: Let the Record show that she has identified the Defendant.

Q. What did you do next?

A. Officer Butler responded to my location. She came to the vehicle and we checked the vehicle where he had went and put, appeared to be putting something underneath the car or underneath the seat and located some items.

Q. What were these items?

A. Located micron radar detector, cassette tape and flashlight.

Q. Anything specific about the items?

A. They were wet, the tape and radar detector were wet and the flashlight felt like it was cool, outside.

Q. How did you know these items were wet?

A. We picked them up and looked at them and seen the moisture.

Q. Okay. Did you have any reason to believe they were stolen?

A. With the complaint that we had, yes, and we had been having problems in the whole city with people entering cars and stealing items?

Q. What did you do next?

A. Another officer arrived and we found out where Jason was waiting for Shad to pick him up and we sent an officer to pick up Jason and send him to the scene and in the meantime we proceeded to go to

the car and get it impounded and Shad at different times was beating on the car and yelling and I asked what he was wanting, and we talked at different times and I advised him of his constitutional rights verbally and I secured items, got his keys. In the trunk were several radar detectors.

Q. Did you read him his constitutional rights?

A. I advised him verbally of the constitutional rights. At the station when I was going to make out the statement I read it and I showed him the form.

Q. Did he say anything?

A. He did not want to cooperate with us.

Q. How did you search the car, how did you open the trunk?

A. With the keys, he had the keys in the ignition when I approached the car and I took the keys and opened the trunk.

Q. So when Shad got in the car the keys were already in the ignition when you approached.

A. Yes, when I approached he had the keys in the ignition. I wanted to get to the car before he moved it.

Q. Why did you open the trunk?

A. We found items that we believed to be stolen and we were going to have the vehicle impounded so we did an inventory search, also.

Q. And you found like you said previously, radar detectors, cassette tapes?

A. Yes.

Q. And what did you do with the items that you found in the trunk?

A. Patrolman Butler and I secured the items in the trunk that we knew that were reported, radar detectors and items that we questioned and items in the car that had been taken that night in that area

and we secured those in paper bags and placed them in one of the cruisers and the car was impounded to the Blubaugh's Garage.

Q. Briefly, how did you know some of the items had been stolen?

A. We had taken several reports for months of radios and detectors being stolen as a continual problem that we were having.

MR. MCCLAREN: Thank you. No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION OF KIMBERLY S. LEMLEY

BY MR. GUSTAFSON

Q. I'm not clear, Officer Lemley, where you were when this whole thing started and by whole thing started, did you ride out with --

A. I was in a separate cruiser. I parked out of the area and walked in.

Q. Did you get the same radio dispatch that officer --

A. Yes, we would have.

Q. You were both in the car at the time that the dispatch came is that right?

A. Yes.

Q. And so you heard the same things which she heard which were basically there were a couple subjects, suspicious people walking down the street looking --

A. Looking in cars and the vehicle was parked behind 309 Oak Street.

Q. Do you know who called in, did you at that time?

A. I think that the resident of 309 but was not given their name.

Q. Do you know?

A. Jack Austin.

Q. Was it in fact that person that called that in?

A. I didn't talk to Jack, Patrolman Butler talked to him and called, made the report.

Q. At the time that you went to the scene and seized the evidence you did not know who called in the report?

A. No, as far as the name, no.

Q. And the person that called it in was a reliable person or the report that you received was reliable?

A. That's correct, that's why we checked it out.

Q. So all you did know was that there was reason to be dispatched to Oak Street to see if suspicious people were around there looking in cars?

A. Exactly.

Q. You went there and stood behind or you found a car parked in an alley, was it not?

A. No. We knew where the car was parked. The people called in and said

they got out of the car which was in East School.

Q. Was that car parked in an alley?

A. Yes, at the end of East School it comes to a dead end and cuts to the north.

Q. It was parked in an alley; is that correct?

A. Yes.

Q. Was Shad Lynds ever charged for any offense relating to that vehicle?

A. Either operation of the vehicle, the parking of the vehicle, a traffic offense?

Q. Yes.

A. No.

Q. Was he ever charged with criminal trespass?

A. No.

Q. Now, so you got there and the first thing you did or one of the things you did you found a car parked in the alley

of 309 Oak Street, Mount Vernon, Ohio and called in the license number and came back as licensed to Shad Lynds, the Defendant in this case; is that correct?

A. I don't know if I called the plate number in at that time or not.

Q. According to -- did you make the report in this case.

A. Yes, sir.

Q. Is this your writing?

A. I would have to see the page. Some of the supplement Officer Butler made.

Q. Starting on the first page?

A. Yes, that's mine.

Q. Did you not indicate when you wrote up the report that you knew that the car was owned by Shad Lynds--

A. I don't--

Q. --prior to time that you saw him?

A. I don't recall when I ran the plate number whether it was before he came to the car or not.

Q. Nothing in the report that you ever saw Shad Lynds looking in any vehicles?

A. That's correct.

Q. And nothing in the report that you ever saw Shad Lynds waling up and down the street, Oak Street?

A. That's correct.

Q. And there is nothing in your report that would indicate that you ever saw Shad Lynds talking to in any way with Jason Blubaugh?

A. Yes, I did. When Shad was standing around the corner of it Jason went back to him.

Q. Did you see the two of them talk at all?

A. They stood therefore a few minutes. I couldn't tell if they talked. I know that Jason told Shad to come to the park so apparently there was some communication.

Q. At the time you searched the area you had no idea what the communications were between Shad Lynds and Jason?

A. No, I did not.

Q. Now, then you subsequently saw Shad Lynds run across the street and get in the car?

A. Run through the yard to go there, the backyard and to the car.

Q. How close were you at that time?

A. Probably less that 100 feet.

Q. Was it a fairly well lit area?

A. No, dark area. Where I was sitting in the dark. Around the school, it was lit. He was around the building.

Q. Could you see him well when he ran through the area?

A. I watched from the time he started running, came through the yard and back to the backyard and across to the car.

Q. And watching that, how was he running, was he running with his arms up or flared or what?

A. Run a pretty good pace.

Q. His arms were up when he was running?

A. I don't know. When a person runs they run with their arms up some.

Q. Was he carrying anything?

A. I couldn't tell that.

Q. You were around 100 feet away with a fairly lit area and he had his arms up some but you couldn't see him carrying anything?

A. No, I couldn't.

Q. Could you see any indication that he was carrying anything at that point in time?

A. Not at that time.

Q. If he had a radar detector wouldn't it show up and show--

MR. MCCLAREN: Asked and answered.

THE COURT: Overruled. go ahead.

A. Some of them are small enough that you hold them in the hands.

Q. How big are the micron radar detectors?

A. Small, not big at all.

Q. Did you have any indication that Shad had anything in his hands or had anything in his hands when he got in the car?

A. When he went in the car and went up the passenger seat I believe that he had put something on the seat.

Q. In fact you went to the car and knocked on the window; is that correct?

A. Yes.

Q. And you identified yourself?

A. Yes.

Q. And he identified himself?

A. I asked him to step out of the car and give me the driver's license.

Q. And he gave you the driver's license?

A. Yes.

Q. And at that point in time there was nothing on that person that you could see?

A. That's correct.

Q. And, in fact, you asked him why he had been under the seat and he said, putting the cassette in his cassette player?

A. No.

Q. What did he tell you?

A. I can't recall him saying the cassette in the dash player.

Q. Or reaching to get a cassette, did he tell you that?

A. I don't know. He could have.

Q. So he could have given you an explanation of reaching under the seat, you don't recall?

A. Correct, I don't recall what he told me about that.

Q. You then looked into the car, and to see what was in the car right, Officer.

A. That's correct.

Q. And what you saw was a radar detector in the car?

A. Underneath the seat and--

Q. And a flashlight?

A. Yes.

Q. And a Jackson Brown cassette?

A. Cassette tape.

Q. And 30 other cassettes in the car?

A. Probably more than 30 in the trunk area.

Q. And cassette player in the car?

A. Yes.

Q. And you didn't think it unusual that evening for the car to have a cassette player in it?

A. No.

Q. Did you find it unusual for the car to have a flashlight in it?

A. No.

Q. Did you find it unusual for it to have a radar detector in it?

A. No.

Q. Now, on that basis, you had gotten Shad Lynds out of the car now and had you ordered him to exit the car; is that correct?

A. Yes.

Q. And did you search him at that time?

A. I don't--I am not sure if I searched his person at that time or not, I may have.

Q. Wouldn't you have searched him before he got in the cruiser, isn't that standard?

A. Yes, sir.

Q. And did you search him before he got in the cruiser, correct?

A. I must have.

Q. And I assume that you didn't find anything unusual?

A. Not on him.

Q. Right.

A. No.

Q. And you placed him in the cruiser and put him where he was, in essence, under arrest at that time?

A. We had not placed him under arrest. In fact, he went home that night.

Q. If he was place in the cruiser was he free to leave the cruiser at that time?

A. Not at that time.

Q. If he wasn't free to leave the cruiser, what was your purpose of putting him in the cruiser, to secure him so he wouldn't leave?

A. At that time because of the call that we had and the suspicions he was under he was going to be detained for a while.

Q. Was involuntarily detained and placed in the cruiser to accomplish this purpose?

A. Yes, to complete the investigation.

Q. Up to that point, again according to the report, you seen him get in the car and reach under the seat and taken him

out of the car and determined that he was the owner of the car and properly presented to you a driver's license, the car was properly parked in an alley and he was detained in the cruiser and up to that point in time what you had observed in the car was a radar detector, a cassette tape and a flashlight?

A. Yes, they were wet. And I cannot say it was properly parked. It is against the law to black an alley.

Q. Was he charged?

A. No.

Q. Was he detained for that purpose?

A. No.

Q. You then asked Shad if he would give you permission to search the vehicle, did you not?

A. I can't recall asking for permission. I didn't feel that I needed it.

Q. Okay. Your report indicates that he identified himself and you asked for his

driver's license and he gave it to you and he was secured in the cruiser and you and Patrolman Butler check the vehicle and actually search the inside of the vehicle; is that correct?

A. Yes, and we located the wet radar detector and the flashlight that was cool after -- and after we located those items we went on.

Q. From looking at the report it appears--did you put this report in chronological order?

A. I tried to--I tried to refer --

Q. What actually happened was in this order: I requested his driver's license which he game me?

A. Yes.

Q. And Shad was secured in the cruiser, next; is that correct?

A. Yes.

Q. And then Patrolman Lemley, which is yourself, and Patrolman Butler check Shad's vehicle?

A. Yes.

Q. And that's when under the passenger side front seat we located a radar detector, a micron cassette, or however you pronounce that, and cassette tape by Jackson Brown. Both of these items were wet?

A. Yes.

Q. And also located in the front a Blackmag flashlight?

A. Yes.

Q. And the flashlight felt cool.

A. Yes.

Q. So you actually located these items after Shad was secured in the cruiser; is that right?

A. Yes.

Q. And you didn't see these items before you secured him in the cruiser; is that right?

A. That's correct. There is a reason for that.

Q. And chronologically what really happened is that you go there, you get Shad and you secure him and then you search the car?

A. Yes.

Q. And that's the first time upon searching the car that you saw these items?

A. Yes.

Q. And you did not have his permission to search the car at that point in time, did you.

A. No.

Q. After you searched the car, you and Patrolman Butler, after you actually searched the car and first found these items and after Shad had been secured in

the cruiser by you, not allowed to leave the area, then you took the keys and you searched the trunk, did you not?

A. Yes.

Q. And again you didn't have his permission to search the trunk, did you?

A. No.

Q. And he object to you searching it?

A. Yes, he got highly upset when we went into the trunk area.

Q. And at that point in time you obtained additional items from the trunk?

A. Yes.

Q. I will hand you the Bill of Particulars and ask you where you got each of these items that is listed. Did every item in the Bill of Particulars come out of the car?

A. Yes.

Q. Okay. Of the three items that you talked about previously, the radar

detector and cassette tape and flashlight listed in the Bill of Particulars.

A. The flashlight is not. The micron radar detector is listed and the cassette tapes.

Q. What about the Jackson Brown; is that part--

A. It says cassette tapes. It doesn't list them.

Q. They came from inside the car and not in plain view when you secured Shad; is that correct?

A. That's correct.

Q. Was there anything else on that Bill of Particulars in this case that came from inside the car?

A. The Whistler 200 radio and two rugs and two blue car mats and two high school letters and the radar detector taken from the vehicle.

Q. They were not in plain sight at the time that you secured Shad?

A. The rugs may have been on the floorboards.

Q. Anything unusual?

A. Blue car mats were down by where the, you know, where they belonged. They were placed in the car.

Q. You could see the rugs and car mats?

A. At least the car mats, yeah.

Q. Okay. Wee the rest of the items that are contained in the Bill of Particulars found in the car taken from the trunk of the car then?

A. Yeah, most of them were taken from the trunk.

Q. And you had to obtain the keys and actually open up the trunk?

A. Yes, it's a hatchback.

Q. Nothing unusual about the trunk, is there?

A. Not that I know. I didn't notice anything unusual.

Q. Could you see inside of the trunk without opening it?

A. I can't recall. Some of the cars that you look down through the back window, but a cover was over it but I couldn't see anything in the trunk until I opened it.

Q. Okay. You then opened the trunk and obtained the rest of the items that is shown in the Bill of Particulars; is that right?

A. Yes.

Q. Are there any other items on the Bill of Particulars that were not taken from Shad Lynds' car that evening?

A. Are there any items on this that were not taken from Shad Lynds' car?

Q. Yes?

A. No.

Q. Okay. Now, after you had obtained all of these items--was it before or after

you obtained these items that you read Shad the Miranda Rights?

A. Once he was placed he called me back over and wanted to say something and I advised him of his constitutional rights verbally at that time.

Q. Before or after?

A. Beforehand.

Q. When he opened the trunk.

A. He called me over and he wanted his girlfriend to take the car.

Q. What rights, do you have a card or something that you recite to him.

A. I didn't read them.

Q. Did you cover all of them?

A. Yes sir.

Q. And the first thing is, that I recollect, is something you are now under arrest; is that right?

A. No.

Q. What is--what did you advise SHad?

A. You have the right to remain silent. A person does not have to be under arrest to be advised of them.

Q. He was in custody at that time?

A. He was being detained.

Q. Okay. As a result of your having obtained all of these that you have listed on the Bill of Particulars and as a result of having searched the vehicle, you then went on and did more investigation in this case; isn't that true?

A. Yes.

Q. Okay. And the investigation included searching Shad's apartment at a later date?

A. Later that morning.

Q. Okay. And that was a result of having searched and found these items of his?

A. Correct.

Q. And also as a result of that you went through the apartment and did you see some items at the apartment?

A. The first time that we went to it we were not allowed to enter it and the next morning with a search warrant and the delayed time most of them were removed and we did locate some that were stolen.

Q. And you retained those items and this is a continuation of these events: First, you see Shad and put him in custody and you search the car. As a result of the search you determined that you wanted to go to the apartment. As a result of the search -- you get the search warrant and search the apartment and obtained some items there and you talked to other people and obtained statements from other people and get further statements from other people as a chain of these events; is that correct?

A. That's correct.

Q. And all as a result of having search the car and found these things that you subsequently found everything else and got statements from other people?

A. Yes, I did.

Q. And the only thing that Shad was charged with was theft of these items, to your knowledge?

A. Receiving stolen property.

Q. Receiving stolen property. He was not charged with any offense involving operating a motor vehicle, trespass or anything else but receiving stolen property. Any charge against Shad or any reason against Shad was as a result of this search; is that correct?

A. That's correct.

Q. Okay. You didn't have any warrant at the time that you searched his car?

A. No, I did not.

Q. You had not sought any warrant that time?

A. No, I did not.

Q. And every item that was in the Bill of Particulars was seized actually at the time that the car was taken from the scene?

A. Yes, that's correct.

Q. And even seized before Shad Lynds was taken?

A. Yes.

Q. And probably seized from the few minutes that you saw Shad Lynds?

A. Several minutes.

Q. Okay.

MR. GUSTAFSON: I have no further questions.

THE COURT: Redirect?

BY MR. MCCLAREN:

Q. Officer Lemley, why did you secure Shad before searching the car?

A. Both Officer Butler and I entered the car from the side and I didn't know if he

would take off on me and I secured him in there to stay.

MR. MCCLAREN: Thank you.

THE COURT: Recross?

MR. GUSTAFSON: Nothing.

THE COURT: Thank you. State have anything further?

MR. MCCLAREN: No, Your Honor.

THE COURT: Defense want to present any evidence?

MR. GUSTAFSON: Nothing, Your Honor.

THE COURT: Summation.

THEREUPON, Counsel presented closing arguments.

THE COURT: I find there was legitimate search made and the motion to suppress the evidence is denied. That is it.

CERTIFICATE

This is to certify that the foregoing is a true and accurate transcript of the

aforementioned matter as taken by Linda S. McGee in stenotype and later transcribed by a Computer Aided Transcription System.

/s/

SUSAN J. SWIND
Stenotype Reporter
225 Orange Street
Ashland, OH 44805

267 U.S. 132

CARROLL et al. v. UNITED STATES

(Reargued and Submitted March 14, 1924.

Decided March 2, 1925.)

Error to the District Court of the United States for the Western District of Michigan.

George Carroll and John Kiro were convicted of transporting intoxicating liquor, and they bring error. Affirmed.

This is a writ of error to the District Court under section 238 of the Judicial Code (Comp. St. Section 1215). The Plaintiffs in error, hereafter to be called the defendants, George Carroll and John Kiro, were indicted and convicted for transporting in an automobile intoxicating spirituous liquor, to wit,

68 quarts of so called bonded whisky and gin, in violation of the National Prohibition Act (Comp. St. Ann. Supp. 1923, Section 10138 1/4 et seq.). The ground on which they assail the conviction is that the trial court admitted in evidence two of the 68 bottles, one of whisky and one of gin, found by searching the automobile. It is contended that the search and seizure were in violation of the Fourth Amendment, and therefore that use of the liquor as evidence was not proper. Before the trial a motion was made by the defendants that all the liquor seized be returned to the defendant Carroll, who owned the automobile. This motion was denied.

The search and seizure were made by Cronenwett, Scully, and Thayer, federal prohibition agents, and one Peterson, a state officer, in December, 1921, as the

car was going westward on the highway between Detroit and Grand Rapids at a point 16 miles outside of Grand Rapids. The facts leading to the search and seizure were as follows: On September 29th, Cronenwett and Scully were in an apartment in Grand Rapids. Three men came to that apartment, a man named Kruska, and the two defendants, Carroll and Kiro. Cronenwett was introduced to them as one Stafford working in the Michigan Chair Company in Grand Rapids, who wished to buy three cases of whisky. The price was fixed at $130 a case. The three men said they had to go to the east end of Grand Rapids to get the liquor and that they would be back in half or three-quarters of an hour. They went away, and in a short time Kruska came back and said they could not get it that night, that the man who had it was not in, but that they would deliver it the next day. They

had come to the apartment in an automobile known as an Oldsmobile roadster, the number of which Cronenwett then identified, as did Scully. The proposed vendors did not return the next day, and the evidence disclosed no explanation of their failure to do so. One may surmise that it was suspicion of the real character of the proposed purchaser, whom Carroll subsequent called by his first name when arrested in December following. Cronenwett and his subordinates were engaged in patrolling the road leading from Detroit to Grand Rapids, looking for violations of the Prohibition Act. This seems to have been their regular tour of duty. On the 6th of October, Carroll and Kiro going eastward from Grand Rapids in the same Oldsmobile roadster, passed Cronenwett and Scully some distance out from Grand Rapids. Cronenwett call to Scully, who

was taking lunch, that the Carroll boys had passed them going toward Detroit, and sought with Scully to catch up with them to see where they were going. The officers followed as far as East Lansing, half way to Detroit, but there lost trace of them. On the 15th of December, some two months later, Scully and Cronenwett, on their regular tour of duty with Peterson, the state officer, were going from Grand Rapids to Ionia, on the road to Detroit, when Kiro and Carroll met and passed them in the same automobile, coming from the direction of Detroit to Grand Rapids. The government agents turned their car and followed the defendants to a point some 16 miles east of Grad Rapids, where they stopped them and searched the car. They found behind the upholstering of the seats, the filling of which had been removed, 68 bottles. These had labels on them, part

purporting to be certificates of English chemists that the contents were blended Scotch whiskeys,a nd the rest that the contents were Gordon gin make in London. When an expert witness was called to prove the contents, defendants admitted the nature of them to be whisky and gin. When the defendants were arrested, CArroll said to Cronenwett, "Take the liquor and give us one more chance, and I will make it right with you," and he pulled out a roll of bills, of which one was for $10. Peterson and another took the two defendants and the liquor and the car to Grand Rapids, while Cronenwett, Thayer, and Scully remained on the road looking for other cars, of whose coming they had information. The officers were not anticipating that the defendants would be coming through on the highway at that particular time, but when they met them there they believed they were

carrying liquor, and hence the search, seizure, and arrest.

Messers. Thomas E. Atkinson and Clare J. Hall, both of Grand Rapids, Mich., for plaintiffs in error.

The Attorney General and Mr. James M. Beck, Sol. Gen, of Washington, D.C., for the United States.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The constitutional and statutory provisions involved in this case include the Fourth Amendment and the National Prohibition Act.

The Fourth Amendment is in part as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by the oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 25, title 2, of the National Prohibition Act, c. 85, 41 Stat. 305, 315, passed to enforce the Eighteenth Amendment, makes it unlawful to have or possess any liquor intended for use in violating the act, or which has bee so used, and provides that no property rights shall exist in such liquor. A search warrant may issue and such liquor, with the containers thereof, may be seized under the warrant and be ultimately destroyed. The section further provides:

> "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house."

Section 26, title 2, under which the seizure herein was made, provides in part as follows:

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

The section then provides that the court upon conviction of the person so arrested shall order the liquor destroyed, and except for good cause shown shall order a sale by public auction of the other property seized, and that the proceeds shall be paid into the Treasury of the United States. By section 6 of an act supplemental to the

National Prohibition Act (42 Stat. 222, 223, c. 134 [Comp. St. Ann. Supp. 1923, Section 10184a]) it is provided that if any officer or agent or employee of the united States engaged in the enforcement of the Prohibition Act or this Amendment, "shall search any private dwelling,' as defined in that act, "without a warrant directing such search,' or "shall without a search warrant maliciously and without reasonable cause search any other building or property,' he shall be guilty of a misdemeanor and subject to fine or imprisonment or both.

In the passage of the supplemental act through the Senate, amendment No. 32, known as the Stanley Amendment, was adopted, the relevant part of which was as follows:

> "Sec. 6. That any officer, agent or employee of the United States engaged in the enforcement of this act or the United States, who shall search or attempt to search the property or premises of any person without previously securing a

search warrant, as provided by law, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed $1,000, or imprisoned not to exceed one year, or both so fined and imprisoned in the discretion of the court."

This amendment was object to in the HOuse, and the judiciary committee, to whom it was referred, reported to the House of Representatives the following as a substitute:

"Sec. 6. That no officer, agent or employee of the United States, while engaged in the enforcement of this act, the National Prohibition Act, or any law in reference to the manufacture or taxation of, or traffic in, intoxicating liquor, shall search any private dwelling without a warrant directing such search, and no such warrant shall issue unless there is reason to believe such dwelling is used as a place in which liquor is manufactured for sale or sold. The term 'private dwelling' shall be construed to include the room or rooms occupied not transiently, but solely as a residence in an apartment house, hotel, or boarding house. Any violation of any provision of this paragraph shall be punished by a fine of not to exceed $1,000 or imprisonment not to exceed one year, or both such find and imprisonment, in the discretion of the court."

In its report the committee spoke in part as follows:

"It appeared to the committee that the effect of the Senate amendment No. 32, if agreed to by the House, would greatly cripple the enforcement of the National Prohibition Act and would otherwise seriously interfere with the government in the enforcement of many other laws, as its scope is not limited to the prohibition law, but applies equally to all laws where prompt action is necessary. There are on the statute books of the united States a number of laws authorizing search without a search warrant. Under the common law and agreeable to the Constitution search may in many cases be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but it does forbid unreasonable search. This provision in regard to search is as a rule contained in the various state Constitutions, but notwithstanding that fact search without a warrant is permitted in many cases, and especially is that true in the enforcement of liquor legislation.

"The Senate amendment prohibits all search or attempt to search any property or premises without a search warrant. The effect of that would necessarily be to prohibit all search, as no search can take place if it is not on some property or premises.

> "Not only does this amendment prohibit search of any lands but it prohibits the search of all property. It will prevent the search of the common bootlegger and his stock in trade, though caught and arrested in the act of violating the law. But what is perhaps more serious, it will make it impossible to stop the run-running automobiles engaged in like illegal traffic. It would take from the officers the power that they absolutely must have to be of any service, for if they cannot search for liquor without a warrant they might as well be discharged. It is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of."

The conference report resulted, so far as the difference between the two houses was concerned, in providing for the punishment of any officer, agent, or employee of the government who searches a "private dwelling" without a warrant, and for the punishments of any such officer, etc., who searches any "other building or property' where, and only where, he makes the search without a warrant "maliciously

and without probable cause." In other words, it left the way open for searching an automobile or vehicle of transportation without a warrant, if the search was not malicious or without probable cause.

[1] The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

The leading case on the subject of search and seizure is Boyd v. United

States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746. An Act of Congress of June 22, 1874 (18 Stat. 187), authorized a court of the untied States in revenue cases, on motion of the government attorney, to require the defendant to produce in court his private books, invoices, and papers on pain in case of refusal of having the allegations of the attorney in his motion taken as confessed. This was held to be unconstitutional and void as applied to suits for penalties or to establish a forfeiture of goods, on the ground that under the Fourth Amendment the compulsory production of invoices to furnish evidence for forfeiture of goods constituted an unreasonable search even where made upon a search warrant, and was also a violation of the Fifth Amendment, in that it compelled the defendant in a criminal case to produce evidence against

himself or be in the attitude of confessing his guilt.

In Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 837, Ann. Cas. 1915C, 1177, it was held that a court in a criminal prosecution could not retain letters of the accused seized in his house, in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises, to be used as evidence against him, the accused having made timely application to the court for an order for the return of the letters.

In Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, a writ of error was brought to reverse a judgment of contempt of the District Court, fining the company and imprisoning one Silverthorne, its president, until he should purge himself

of contempt in not producing books and documents of the company before the grand jury to prove violation of the statutes of the United States by the company and Silverthorne. Silverthorne had been arrested, and while under arrest the marshall had gone to the office of the company without a warrant and made a clean sweep of all books, papers, and documents found there and had taken copies and photographs of the papers. The District court ordered the return of the originals, but impounded the photographs and copies. This was held to be an unreasonable search of the property and possessions of the corporation and a violation of the Fourth Amendment and the judgment for contempt reversed.

In Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, the obtaining through stealth by a representative of the government from the

office of one suspected of defrauding the government of a paper which had not pecuniary value in itself, but was only to be used as evidence against its owner, was held to be a violation of the Fourth Amendment. It was further held that when the paper was offered in evidence and duly objected to it must be ruled inadmissible because obtained through an unreasonable search and seizure and also in violation of the Fifth Amendment because working compulsory incrimination.

In Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654, it was held that where concealed liquor was found by government officers without a search warrant in the home of the defendant, in his absence, and after a demand made upon his wife, it was inadmissible as evidence against the

defendant, because acquired by an unreasonable seizure.

In none of the cases cited is there any ruling as to the validity under the Fourth Amendment of a seizure without a warrant of contraband goods in the course of the transportation and subject to forfeiture or destruction.

[2] On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the

interests and rights of individual citizens.

In Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, as already said, the decision did not turn on whether a reasonable search might be made without a warrant; but for the purpose of showing the principle one which the Fourth Amendment proceeds, ad to avoid any misapprehension of what was decided, the court, speaking through Mr. Justice Bradley, used language which is of particular significant and applicability here. It was there said (page 623 [6 S. Ct. 528]):

> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto coelo. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is

authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the Act of July 31, 1789, 1 Stat. 29, 43, contains provision to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coins, lottery tickets, implements of gambling, etc., are not within this category. Commonwealth v. Dana, 2 Metc. (Mass.) 329. Many other things of

this character might be enumerated."

It is noteworthy that the twenty-fourth section of the act of 1789 to which the court there refers provides:

> "That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the daytime only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited." 1 Stat. 43.

Like provisions were contained in the Act of August 4, 1790, c. 35, Sections 48-51, 1 Stat. 145, 170; in section 27 of

the Act of February 18, 1793, c. 8, 1 Stat. 305, 315; and in sections 68-71 of the Act of March 2, 1799, c. 22, 1 Stat. 627, 677, 678.

Thus contemporaneously with the adoption of the Fourth Amendment we find in the First Congress, and in the following Second and fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in the course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant. Compare Hester v. United States, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898.

Again, by the second section of the Act of March 3, 1815, 3 Stat. 231, 232, it was made lawful for customs officers, not only to board and search vessels

within their own and adjoining districts, but also to stop, search, and examine any vehicle, beast, or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law, whether by the person in charge of vehicle or beast or otherwise, and if they should find any goods, wares or merchandise thereon, which they had probable cause to believe had been so unlawfully brought into the country, to seize and secure the same, and the vehicle or beast as well, for trial and forfeiture. This act was renewed April 27, 1816 (3 Stat. 315), for a year and expired. The Act of February 28, 1865, revived section 2 of the Act of 1815, above described, 13 Stat. 441, C. 67. The substance of this section was re-enacted in the third section of the Act

of July 18, 1866, C. 201, 14 Stat. 178, and was thereafter embodied in the Revised Statutes as section 3061 (Comp. St. Section 5763). Neither section 3061 nor any of its earlier counterparts has ever been attacked as unconstitutional. In deed, that section was referred to and treated as operative by this court in Cotzhausen v. Nazro, 107 U. S. 215, 219, 2 S. Ct. 503, 27 l. Ed. 540. See also, United States v. One Black Horse (D C.) 129 F. 167.

Again by section 2140 oft he REvised Statutes (Comp. St. Section 4141) any Indian agent, subagent or commander of a military post in the Indian country, having reason to suspect or being informed that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian country, in violation of law, may cause the boats, stores, packages,

wagons, sleds and places of deposit of such person to be searched and if any liquor is found therein, then it, together with the vehicles, shall be seized and and proceeded against by libel in the proper court and forfeited. Section 2140 was the outgrowth of the Act of May 6, 1822, c. 58, 3 Stat, 682, authorizing Indian agent to cause the goods of traders in the Indian country to be searched upon suspicion or information that ardent spirits were being introduced into the Indian country to be seized and forfeited if found, and of the Act of June 30, 1834, Section 20, c. 161, 4 Stat. 729, 732, enabling an Indian agent having reason to suspect any person of having introduced or being about to introduce liquors into the Indian country to cause the boat, stores or places of deposit of such person to be searched and the liquor found forfeited. This court

recognized the statute of 1822 as justifying such a search and seizure in American Fur Co. v. United States, 2 Pet. 358, 7 L. Ed. 450. By the Indian Appropriation Act of March 2, 1917, c. 146, 39 Stat. 969, 970, automobiles used in introducing or attempting to introduce intoxicants into the Indian territory may be seized, libeled, and forfeited as provided in the REvised Statutes, Section 2140.

And again in Alaska, by section 174 of the Act of March 3, 1899, c. 429, 30 Stat. 1253, 1280, it is provided that collectors and deputy collectors or any person authorized by them in writing shall be given power to arrest persons and seize vessels and merchandise in Alaska liable to find, penalties, or forfeiture under the act and to keep and deliver the same, and the Attorney

General, in construing the act, advised the government:

> "If your agents reasonably suspect that a violation of law has occurred, in my opinion they have power to search any vessel within the three-mile limit according to the practice of customs officers when acting under section 3059 of the REvised Statutes [Comp. St. Section 5761], and to seize such vessels." 26 Op. Attys. Gen. 243.

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of

the locality or jurisdiction in which the warrant must be sought.

Having this established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those

lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. Section 26, title 2, of the National Prohibition Act, like the second section of the act of 1789, for the searching of vessels, like the provisions of the act of 1815, and section 3601, Revised Statutes, for searching vehicles for smuggled goods, and like the act of 1822, and that of 1834 and section 2140, R. S., and the act of 1917 for the search of vehicles and automobile for liquor smuggled into the INdian country, was enacted primarily to accomplish the seizure and destruction of contraband goods; secondly, the automobile was to be forfeited; and,

thirdly, the driver was to be arrested. Under section 29, title 2, of the act the latter might be punished by not more than $500 find for the first offense, not more than $1,000 find and 90 days' imprisonment for the third offense. Thus he is to be arrested for a misdemeanor for his first and second offenses, and for a felony if he offend the third time.

[3] The main purpose of the act obviously was to deal with the liquor and its transportation, and to destroy it. The mere manufacture of liquor can do little to defeat the policy of the Eighteenth Amendment and the Prohibition Act, unless the forbidden product can be distributed for illegal sale and use. Section 26 was intended to reach and destroy the forbidden liquor in transportation and the provisions for forfeiture of the vehicle and the arrest of the transporter were incidental. The

rule for determining what may be required before a seizure may be made by a competent seizing official is not to be determined by the character of the penalty to which the transporter may be subjected. Under section 28, title 2, of the Prohibition Act, the Commissioner of Internal Revenue, his assistants, agents and inspectors are to have the power and protection in the enforcement of the act conferred by the existing laws relating to the manufacture or sale of intoxicating liquors. Officers who seize under section 26 of the Prohibition Act are therefore protected by section 970 of the Revised Statutes (Comp. St. Section 161), providing that:

> "When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof

> to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: Provided, that the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent."

[4] It follows from this that, if an officer seizes an automobile or the liquor in it without a warrant, and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by a showing that he had reasonable or probable cause for the seizure. Stacey v. Emery, 97 U. S. 642, 24 L. Ed. 1035. The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor

therein which is being illegally transported.

We here find the line of distinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under section 26, in absence of probable cause, a right to have restored to him the automobile, it protects him under the Weeks and Amos Cases form use of the liquor as evidence against him, and it subjects the officer making the seizures to damages. On the other hand, in a case showing probable cause, the government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them.

Such a rule fulfills the guaranty of the Fourth Amendment. In cases where the

securing of a warrant is reasonably practicable, it must be used and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause. United States v. Kaplan (D. C.) 286 F. 963, 972.

[5] But we are pressed with the argument that if the search of the automobile discloses the presence of liquor and leads under the statute to the arrest of the person in charge of the automobile, the right of seizure should be limited by the common law rule as to the circumstances justifying an arrest without a warrant for a misdemeanor. The usual rule is that a police officer may arrest without warrant one believed by

the officer upon reasonable case to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence. Kurtz v. Moffitt, 115 u. S. 487, 6 S. Ct. 148, 29 L. Ed. 458; John Bad Elk v. United States, 177 U. S. 529, 20 S. Ct. 729, 44 L. Ed. 874. The rule is sometimes expressed as follows:

> "In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence." Halsbury's Laws of England, vol. 9, part. III, 612.

The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace (1 Stephen, History of Criminal Law, 193), while the reason for arrest without warrant on a reliable report of a felony was because the public safety and

the due apprehension of criminals charged iwth heinous offenses required that such arrests should be made at once without warrant (Rohan v. Sawin, 5 Cush. [Mass.] 281). The argument for defendants i that, as the misdemeanor to justify arrest without warrant must be committed in the presence of the police officer, the offense is not committed in his presence unless he can by his senses detect that the liquor is being transported, no matter how reliable his previous information by which he can identify the automobile as loaded with it. Elrod v. Moss (C. C. A.) 278 F. 123; Hughes v. State, 145 Tenn. 544, 238 S. W. 588, 20 A. L. R. 639.

[6] So it is that under the rule contended for by defendants the liquor if carried by one who has been already twice convicted of the same offense may be seized on information other than the

senses, while if he has been only once convicted it may not be seized unless the presence of the liquor is detected by the senses at the automobile concealing it rushes by. This is certainly a very unsatisfactory line of difference when the main object of the section is to forfeit and suppress the liquor, the arrest of the individual being only incidental as shown by the lightness of the penalty. See Commonwealth v. Street, 3 Pa. Dist. and Co. Ct. Rep. 783. In England at the common law the differences in punishment between felonies and misdemeanors was very great. Under our present federal statutes, it is much less important and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors. As the main purpose of section 26 was seizure and forfeiture, it is not so much the owner as the property

that offends. Agnew V. Haymes, 141 F. 631, 641, 72 C. C. A. 325. The language of the section provides for seizure when the officer of the law "discovers" any one in the act of transporting the liquor by automobile or other vehicles. Certainly it is a very narrow and technical construction of this word which would limit it to what the officer sees, hears or smells as the automobile rolls by and excludes therefrom when he identifies the car the convincing information that he may previously have received as to the use of being made of it.

[7, 8] We do not think such a nice distinction is application in the present case. When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized

and held as evidence in the prosecution. Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Dillon V. O'Brien and Davis, 16 Cox, C. C. 245; Getchell v. Page, 103 Me. 387, 69 A. 624, 18 L. R. A. (N. S.) 253, 125 Am. St. Rep. 307; Kneeland v. Connally, 70 Ga. 424; 1 Bishop, Criminal Procedure, Section 211; 1 Wharton, Criminal Procedure (10th Ed.) Section 97. When argument of defendants is based on the theory that the seizure in this case can only be thus justified. If their theory were sound, their conclusion would be. The validity of the seizure then would turn wholly on the validity of the arrest without a seizure. But the theory is unsound. The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the

seizing officer has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest as section 26 indicates. It is true that section 26, title 2, provides for immediate proceedings against the person arrested and that upon conviction the liquor is to be destroyed and the automobile or other vehicle is to be sold, with the saving of the interest of a lienor who does not know of its unlawful use; but it is evident that if the person arrested is ignorant of the contents of the vehicle, or if he escapes, proceedings can be had against the liquor for destruction or other disposition under section 25 of the same title. The character of the offense for which, after the contraband liquor is found and seized, the driver can be

prosecuted does not affect the validity of the seizure.

This conclusion is in keeping with the requirements of the Fourth Amendment and the principles of search and seizure of contraband forfeitable property; and it is a wise one because it leaves the rule one which is easily applied and understood and is uniform. Houck v. State, 106 Ohio St. 195, 140 N. E. 112, accords with this conclusion. Ash v. United States (C. C. A.) 299 F. 277, and Milam v. United States (C. C. A.) 296 F. 629, decisions by the Circuit Court of Appeals for the Fourth Circuit take the same view. The Ash Case is very similar in its facts to the case at bar, and both were by the same court which decided Snyder v. United States (C. C. A.), 285 F. 1, cited for the defendants. See, also, Park V. United States (1st C. C.

A.) 294 F. 776, 783, and Lambert v. United States (9th C. C. A.) 282 F. 413.

[9] Finally, was there probable cause? In The Apollon, 9 Wheat. 362, 6 L. Ed. 111, the question was whether the seizure of a French vessel at a particular place was upon probable cause that she was there for the purpose of smuggling. In this discussion Mr. Justice Story, who delivered the judgment of the court, said (page 374):

> "It has been very justly observed at the bar that the court is bound to take notice of public facts and geographical positions, and that this remote part of the country has been infested, at different periods, by smugglers, is matter of general notoriety, and may be gathered from the public documents of the government."

We know in this way that Grand Rapids is about 152 miles from Detroit, and that Detroit and its neighborhood along the Detroit river, which is the international boundary, is one of the most active centers for introducing illegally into

this country spirituous liquors for distribution into the interior. It is obvious from the evidence that the prohibition agents were engaged in a regular patrol along the important highways from Detroit to Grand Rapids to stop and seize liquor carried in automobiles. They knew or had convincing evidence to make them believe that the Carroll boys, as they called them, were so-called "bootleggers" in Grand Rapids; i.e., that they were engaged in plying the unlawful trace of selling such liquor in that city. The officers had soon after noted their going from Grand Rapids half way to Detroit, and attempted to follow them to that city to see where they went, but they escaped observation. Two months later these officers suddenly met the same men on their way westward presumably from Detroit. The partners in the original combination to sell liquor

in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whisky to the officers, which was thus identified as part of the firm equipment. They were coming from the direction of the great source of supply for their stock to Grand Rapids, where they plied their trade. That the officers, when they saw the defendants, believed that they were carrying liquor, we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. We do not perceive that it has any weight. As soon as they did appear, the officers were entitled to use their reasoning faculties upon all

the facts of which they had previous knowledge in respect to the defendants.

The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases has lead to frequent definition of the phrase. In Stacey v. Emery, 97 U. S. 642, 645 (24 L. Ed. 1035), a suit for damages for seizure by a collector, this court defined probable cause as follows:

> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

See Locke v. United States, 7 Cranch, 339, 3 L. Ed. 364; The Geoerge, 1 Mason, 24, Fed. Cas. No. 5328; The Thompsons, 3 Wall. 155, 18 L. Ed. 55.

It was laid down by Chief Justice Shaw, in Commonwealth v. Carey, 12 Cush, 246, 251, that:

> "If a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful." Commonwealth v. Phelps, 209 Mass. 396, 95 N. E. 868, Ann. Cas. 1912B, 566; Rohan v. Sawin, 5 Such. 281, 285.

In McCarthy v. De Armit, 99 Pa. 63, the Supreme Court of Pennsylvania sums up the definition of probable cause in this way (page 69):

> "The substance of all the definitions is a reasonable ground for belief of guilt."

In the case of the Director General v. Castenbaum, 263 U. S. 25, 44 S. Ct. 52, 68 L. Ed. 146, which was a suit for false imprisonment, it was said by this court (page 28 [44 S. Ct. 53]):

> "But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent,

which in the judgment of the court would make his faith reasonable."

See, also, Munn v. De Nemours, 3 Wash. C. C. 37, Fed. Cas. No. 9926.

In the light of these authorities, and what is shown by this record, it is clear that the officers here had jurisdiction for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy in formation were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

[10] Counsel finally argue that the defendants should be permitted to escape the effect of the conviction because the court refused on motion to deliver them the liquor when, as they say, the evidence adduced on the motion was much less than that shown on the trial, and

did not show probable cause. The record does not make it clear what evidence was produced in support of or against the motion. But, apart from this, we think the point is without substance here. If the evidence given on the trial was sufficient, as we think it was, to sustain the introduction of the liquor as evidence, it is immaterial that there was an inadequacy of evidence when application was made for its return. A conviction on adequate and admissible evidence should not be set aside on such a ground. The whole matter was gone into at the trial, so no right of the defendants was infringed.

Counsel for the government contend that Kiro, the defendant who did not own the automobile, could not complain of the violation of the Fourth Amendment in the use of the liquor as evidence against him, whatever the view taken as to

Carroll's rights. Our conclusion as to the whole case makes it unnecessary for us to discuss this aspect of it.

The judgment is affirmed.

Mr. Justice McKENNA, before his retirement, concurred in this option.

The separate option of Mr. Justice McREYNOLDS.

1. The damnable character of the "bootlegger's" business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. "To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; * * * in short, to procure an eminent good by means that are unlawful is as little consonant to private morality as to public justice." Sir William Scott, The Le Louis, 2 Dodson, 210, 257.

While quietly driving an ordinary automobile along a much frequented public road, plaintiffs in error were arrested by federal officers without a warrant and upon mere suspicion - ill-founded, as I think. The officers then searched the machine and discovered carefully secreted whisky, which was seized and thereafter used as evidence against plaintiffs in error when on trial for transporting intoxicating liquor contrary to the Volstead Act. 41 Stat. 305, c. 85. They maintain that both arrest and seizure were unlawful and that use of the liquor as evidence violated their constitutional rights.

This is not a proceeding to forfeit seized goods; nor is it an action against the seizing officer for a tort. Cases like the following are not controlling: Crowell v. McFadon, 8 Cranch, 94, 98, 3 L. Ed. 499; United States v. 1960 Bags of

Coffee, 8 Cranch, 398, 403, 405, 3 L. Ed. 602; Otis v. Watkins, 9 Cranch, 339, 3 L. Ed. 752; Gelston v. Hoyt, 3 Wheat, 245, 310, 318, 4 L. Ed. 381; Wood v. United States, 16 Pet. 342, 10 381; Wood v. United States, 16 Pet. 342, 10 L. Ed. 987; Taylor v. United States, 3 How. 197, 205, 11 L. Ed. 559. They turned upon express provisions of applicable acts of Congress; they did not involve the point now presented and afford little, if any, assistance toward its proper solution. The Volstead Act does not, in terms, authorize arrest or seizure upon mere suspicion.

Whether the officers are shielded from prosecution or action by Rev. Stat. Section 970, is not important. That section does not undertake to deprive the citizen of any constitutional right or to permit the use of evidence unlawfully obtained. it does, however, indicate the

clear understanding of Congress that probable cause is not always enough to justify a seizure.

Nor are we now concerned with the question whether by apt words Congress might have authorized the arrest without a warrant. It has not attempted to do this. On the contrary, the whole history of the legislation indicates a fixed purpose not so to do. FIrst and second violations are declared to be misdemeanors - nothing more - and Congress, of course, understood the rule concerning arrests for such offenses. Whether different penalties should have been prescribed or other provisions added is not for us to inquire; nor do difficulties attending enforcement give us power to supplement the legislation.

2. As the Volstead Act contains no definite grant of authority to arrest upon suspicion and without warrant for a

first offense, we come to inquire whether such authority can be inferred from this provisions.

Unless the statute which creates a misdemeanor contains some clear provision to the contrary, suspicion that it is being violated will not justify an arrest. Criminal statutes must be strictly construed and applied, in harmony with rules of the common law. United States v. Harris, 177, U. S. 305, 310, 20 S. Ct. 609, 44 L. Ed. 780. And the well-settled doctrine is that an arrest for a misdemeanor may not be made without a warrant unless the offense is committed in the officer's presence.

Kurtz v. Moffitt, 115 U. S. 487, 498, 6 S. Ct. 148, 152 (29 L. Ed. 458):

> "By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate."

John Bad Elk v. United States, 177 U. S. 529, 534, 20 S. Ct. 729, 731 (44 L. Ed. 874):

> "An officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."

Commonwealth v. Wright, 158 Mass. 149, 158, 33 N. E. 92, 95 (19 L. R. A. 206, 35 Am. St. Rep. 475):

> "It is suggested that the statutory misdemeanor of having in one's possession short lobsters with intent to sell them is a continuing offence, which is being committed while such possession continues, and that therefore an officer who sees any person in possession of such lobsters with intent to sell them can arrest such person without a warrant, as for a misdemeanor committed in his presence. We are of opinion, however, that for statutory misdemeanors of this kind, not amounting to a breach of the peace, there is no authority in an officer to arrest without a warrant, unless it is given by statute. * * * The Legislature has often empowered officers to arrest without a warrant for similar offenses, which perhaps tends to show that, in its

opinion, no such right exists at common law."

Pinkerton v. Verberg, 78 Mich, 573, 584, 44 N. W. 579, 582 (7 L. R. A. 507, 18 Am. St. Rep. 473):

> "Any law which would place the keeping and safe-conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which existed long before our Constitution, and we have taken just price in their maintenance, making them a part of the fundamental law of the land." "If persons can be restrained of their liberty, and assaulted and imprisoned, under such circumstances, without complaint or warrant, then there is no limit to the power of a police officer."

3. The Volstead Act contains no provision which annuls the accepted common-law rule or discloses definite intent to authorize arrests without warrant for misdemeanors not committed in the officer's presence.

To support the contrary view section 26 is relied upon:

> "When * * * any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

Let it be observed that this section has no special application to automobiles; it includes *any* vehicle - buggy, wagon, boat, or air craft. Certainly, in a criminal statute, always to be strictly construed, the words "shall discovery * * * in the act of transporting in violation of the law" cannot mean shall have reasonable cause to suspect or believe that such transportation is being carried on. To

discover and to suspect are wholly different things. Since the beginning apt words have been used when Congress intended that arrests for misdemeanors or seizures might be made upon suspicion. It has studiously refrained from making a felony of the offense here charged; and it did not undertake by any apt words to enlarge the power to arrest. It was not ignorant of the established rule on the subject, and well understood how this could be abrogated, as plainly appears from statutes like the following:

> "An act to regulate the collection of duties on imports and tonnage," approved March 2, 1789, 1 Stat. 627, 677, 678, c. 22; "An act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels," approved August 4, 1790, 1 Stat. 145, 170, c. 35; "An act further to provide for the collection of duties on imports and tonnage," approved March 3, 1815, 3 Stat. 231, 232, c. 94.

These and similar acts definitely empowered officers to seize upon suspicion and therein radically differ from the Volstead Act, which authorized no such thing.

"An act supplemental to the National Prohibition Act," approved November 23, 1921, 42 Stat. 222, 223, c. 134, provides:

> "That any officer, agent, or employee of the United States engaged in the enforcement of this act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warranty maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment."

And it is argued that the words and history of this section indicate the

intent of Congress to distinguish between the necessity for warrants in order to search private dwelling and the right to search automobiles without one. Evidently Congress regarded the searching of private dwellings as matter of much graver consequence than some other searches and distinguished between them by declaring the former criminal. But the connection between this distinction and the legality of plaintiffs in error's arrest is not apparent. Nor can I find reason for inquiring concerning the validity of the distinction under the Fourth Amendment. Of course, the distinction is valid, and so are some seizures. But what of it? The act made nothing legal which theretofore was unlawful, and to conclude that by declaring the unauthorized search of a private dwelling criminal Congress intended to remove any ancient

restrictions from other searches and from arrests as well, would seem impossible.

While the Fourth Amendment denounces only unreasonable seizures unreasonableness often depends upon the means adopted. Here the seizure followed an unlawful arrest, and therefore became itself unlawful - as plainly unlawful as the seizure within the home so vigorously denounced in Weeks v. United States, 232 U. S. 383, 391, 392, 393, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.

In Snyder v. United States, 285 F. 1, 2, the Court of Appeals, Fourth Circuit, rejected evidence obtained by an unwarranted arrest, and clearly announced some very wholesome doctrine:

> "That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have

his person searched by force, without a warrant of arrest. If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defendant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without first having secured a warrant, were illegal. And that his only justification was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty or if it had contained any one of a dozen innoxious liquids, the act of the officer would, admittedly, have been an unlawful invasion of the personal liberty of the defendant. That it happened in this instance to contain whisky, we think, neither justifies the assault nor condemns the principle which makes such an act unlawful."

The validity of the seizure under consideration depends on the legality of the arrest. This did not follow the seizure, but the reverse is true. Plaintiffs in error were first brought within the officers' power, and, while therein, the seizure took place. If an officer, upon mere suspicion of a

misdemeanor, may stop one on the public highway, take articles away from him and thereafter use them as evidence to convict him of crime, what becomes of the Fourth and Fifth Amendments?

In Weeks v. United States, supra, through Mr. Justice Day, this court said:

> "The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restrains as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of

all conditions have a right to appeal for the maintenance of such fundamental rights. * * * The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319:

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidding the acquisition of

> evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used it in the way proposed."

Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, and Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654, distinctly point out that property procured by unlawful action of federal officers cannot be introduced as evidence.

The arrest of plaintiffs in error was unauthorized, illegal, and violated the guaranty of due process given by the Fifth Amendment. The liquor offered in evidence was obtained by the search which followed this arrest and was therefore obtained in violation of their constitutional rights. Articles found

upon or in the control of one lawfully arrested maybe used as evidence for certain purposes, but not at all when secured by the unlawful action of a federal officer.

4. The facts known by the officers who arrested plaintiffs in error were wholly insufficient to create a reasonable belief that they were transporting liquor contrary to law. These facts were detailed by Fred Cronenwett, chief prohibition officer. His entire testimony as given at the trial follows:

> "I am in charge of the federal prohibition department in this district. I am acquainted with these two respondents, and first saw them on September 29, 1921, in Mr. Scully's apartment on Oakes street, Grand Rapids. There were three of them that came to Mr. Scully's apartment, one by the name of Kruska, George Kiro, and John Carroll. I was introduced to them under the name of Stafford, and told them I was working for the Michigan Chair Company, and wanted to buy three cases of Whisky, and the price was agreed upon. After they thought I was all right, they

said they would be back in half or three-quarters of an hour; that they had to go out to the east end of Grand Rapids to get this liquor. They went away and came back in a short time, and Mr. Kruska came upstairs and said they couldn't get it that night; that a fellow by the name of Irving, where they were going to get it, wasn't in, but they were going to deliver it the next day, about ten. They didn't deliver it the next day. I am not positive about the price. It seems to me it was around $130 a case. It might be $135. Both respondents took part in this conversation. When they came to Mr. Scully's apartment they had this came car. While it was dark and I wasn't able to get a good look at this car, later, on the 6th day of October, when I was out on the road with Mr. Scully, I was waiting on the highway while he went to Reed's Lake to get a light lunch, and they drove by, and I had their license number and the appearance of their car, and knowing the two boys, seeing them on the 29th day of September, I was satisfied when I seen the car on December 15th it was the same car I had seen on the 6th day of October. On the 6th day of October it was probably twenty minutes before Scully got back to where I was. I told him the Carroll boys had just gone toward Detroit and we were trying to catch up with them and see where they were going. We did catch up with them somewhere along by Ada, just before we got to Ada, and followed them to East Lansing. We gave up the chase at East Lansing.

"On the 15th day of December, when Peterson and Scully and I overhauled this car on the road, it was in the country, on Pike 16, the road leading between Grand Rapids and Detroit. When we passed the car we were going toward Ionia, or Detroit, and the Kiro and Carroll boys were coming towards Grand Rapids when Mr. Scully and I recognized them and said, 'There goes the Carroll brothers,' and we were going and turned around and went back to them - drove up to the side of them. Mr. Scully was driving the car; I was sitting in the front seat, and I stepped out on the running board and held out my hand and said, 'Carroll, stop that car,' and they did stop it. John Kiro was driving the car. After we got them stopped, we asked them to get out of the car, which they did. Carroll referred to me, and called me by the name of 'Fred.' just as soon as I got up to him. Raised up the back part of the roadster; didn't find any liquor there; then raised up the cushion; then I struck at the lazyback of the seat and it was hard. I then started to open it up, and I did tear the cushion some, and Carroll said, 'Don't tear the cushion; we have only got six cases in there,' and I took out two bottles and found out it was liquor; satisfied it was liquor. Mr. Peterson and a fellow by the name of Gerald Donker came in with the two Carroll boys and the liquor and the car to Grand Rapids. They brought the two defendants and the car and the liquor to Grand Rapids.

I and the other men besides Peterson stayed out on the road, looking for other cars that we had information were coming in. There was conversation between me and Carroll before Peterson started for town with the defendants. Mr. Carroll said, 'Take the liquor, and give us one more chance, and I will make it right with you.' At the same time he reached in one of his trousers pickets and pulled out money; the amount of it I don't know. I wouldn't say it was a whole lot. I saw a $10 bill and there was some other bills; I don't know how much there was; it wasn't a large amount.

"As I understand, Mr. Hanley helped carry the liquor from the car. On the next day afterwards, we put this liquor in boxes, steel boxes, and left it in the marshal's vault, and it is still there now. Mr. Hanley and Chief Deputy Johnson, some of the agents and myself were there. Mr. Peterson was there the next day that the labels were signed by the different officers; those two bottles, Exhibits A and B.

"Q. Now, those two bottles, Exhibits A and B, were those the two bottles you took out of the car out there, or were those two bottles taken out of the liquor after it got up here? A. We didn't label them out on the road; simply found it was liquor and sent it in; and this liquor was in Mr. Hanley's custody that evening and during the middle of the next day when we checked it over to see the

amount of liquor that was there. Mr. Johnson and I sealed the bottles, and Mr. Johnson's name is on the label that goes over the bottle with mine, and this liquor was taken out of the case today. It was taken out for the purpose of analyzation. The others were not broken until today.

"Q. And are you able to tell us, from the label and from the bottles, whether it is part of the same liquor taken out of the car? A. It has the appearance of it; yes, sir. Those are the bottles that were in there that Mr. Hanley said was gotten out of the Carroll car.":

Cross-examination:

"I think I was the first one to get back to the Carroll car after it was stopped. I had a gun in my pocket; I didn't present it. I was the first one to the car and raised up the back of the car, but the others were there shortly afterward. We assembled right around the car immediately.

"Q. And whatever examination and what investigation you made you went right ahead and did it in your own way? A. Yes, sir.

"Q. And took possession of it, arrested them, and brought them? A. Yes, sir.

"Q. And at that time, of course, you had no search warrant? A. No, sir. We had no knowledge

that this car was coming through at that particular time.

Redirect examination:

"The lazyback was awfully hard when I struck it with my fist. It was harder than upholstery ordinarily is in those backs; a great deal harder. It was practically solid. Sixty-nine quarters of whisky in one lazyback."

The negotiation concerning three cases of whisky on September 29th was the only circumstance which could have subjected plaintiffs in error to any reasonable suspicion. No whisky was delivered, and it is not certain that they ever intended to deliver any. The arrest came 2 1/2 months after the negotiation. Every act in the meantime is consistent with complete innocence. Has it come about that merely because a man once agreed to deliver whisky, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit!

5. When Congress has intended that seizures or arrests might be made upon suspicion it has been careful to say so. The history and terms of the Volstead Act are not consistent with the suggestion that it was the purpose of Congress to grant the power here claimed for enforcement officers. The facts known when the arrest occurred were wholly insufficient to engender reasonable belief that plaintiffs in error were committing a misdemeanor, and the legality of the arrest cannot be supported by facts ascertained through the search which followed.

To me it seems clear enough that the judgment should be reversed.

I am authorized to say that Mr. Justice SUTHERLAND concurs in this opinion.